FILE COPY

Office Supreme Court U.S.
NOV 23 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 523

CENTRAL TRANSFER COMPANY,
PETITIONER,

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *et al.*,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GLENDY B. ARNOLD,
Counsel for Petitioner.

SUBJECT INDEX.

Page

Petition for writ of certiorari 1-12
Statement of the matter involved 2
Reasons for issuance of writ 9
Prayer for writ 12

Brief in support of petition for writ 13-37
Opinions below 13
Jurisdiction 14
Statement of the case 15
Specification of errors 15
Summary of the argument 16
Argument 21
Petitioner's right to sue 21
Illegal combination 29
Other rulings of the Court of Appeals 33
Disposition of the case 37
Conclusion 37

Table of Cases Cited.

Addyston P. & S. Co. v. U. S., 175 U. S. 211 ..... 18, 20
Barney v. Baltimore, 6 Wall. 280 ..... 16, 22
Bedford Cut Stone Co. v. Journeymen's Stone Cutters Ass'n, 274 U. S. 37 ..... 14, 19, 21, 31
Boston & Maine R. Co. v. Piper, 246 U. S. 439 ..... 17, 28
Brady v. I. C. C., 43 Fed. (2d) 847 28
Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295 ..... 19, 31
Diamond Alkali Co. v. P. C. Thompson & Co., 35 Fed. (2d) 117, 120 37
Duplex Printing Press Co. v. Deering, 254 U. S. 443 ..... 14, 19, 20, 31
Fruit Growers Express, Inc., v. Federal Trade Com., 274 Fed. 205 .. 25
Great Northern R. Co. v. Merchants Elev. Co., 259 U. S. 285 ..... 16, 25
Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 249 ..... 18, 29
Keogh v. Chicago & N. W. Ry. Co., 260 U. S. 156 28
L. & N. R. Co. v. Cook Brewing Co., 223 U. S. 70 25
Loewe v. Lawlor, 208 U. S. 274, 293 ..... 19, 31
Moore v. N. Y. Cotton Exchange et al., 291 Fed. 681, 296 Fed. 61, 270 U. S. 593 ..... 9, 14, 21
O'Halloran v. Slate Co., 207 Fed., l. c. 191 18
Sage v. Hampe, 235 U. S. 99 ..... 17, 28
Shields v. Barrow, 17 How. 130 ..... 16, 22
Standard Oil Co. v. U. S., 221 U. S. 1 ..... 19, 20, 30
Tri-State Amusement Co. v. F. P. Highlands Amusement Co., 192 Mo. 405, 425 ..... 17, 28
Twining v. N. J., 211 U. S. 78 ..... 16, 22
U. S. Navigation Co. v. Cunard S. S. Co., 7 U. S. Sup. Ct. Adv. Op. 300, 50 Fed. (2d) 83, 86 ..... 16, 18, 26
U. S. v. American Tobacco Co., 221 U. S. 106, 179 20
U. S. v. Northern Pac. R. Co., 134 Fed. 715 ..... 16, 22
U. S. v. Patterson, 222 Fed., l. c. 619 18
U. S. v. Standard Oil Co., 173 Fed. 177, 188 20
U. S. v. Terminal R. Ass'n, 224 U. S. 383 ..... 19, 31
U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 312 ..... 18, 20
White v. Sparkhill Realty Corporation, 280 U. S. 500 37

Statutes.

Clayton Antitrust Act 9, 14, 24, 39
Judicial Code, Section 397—Title 28, U. S. C. A 40
Remedies, Title 49, Transportation 3, 41
Sherman Antitrust Act 2, 14, 21, 25, 39

Equity Rules.

Rule 22 41

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.....

CENTRAL TRANSFER COMPANY,
PETITIONER,

v.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS *et al.*,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Supreme Court of the United States:

Your petitioner, the Central Transfer Company, a corporation, respectfully presents to this Court this petition for a writ of certiorari, addressed to the Circuit Court of Appeals of the United States for the Eighth Circuit, commanding said Court and its clerk to certify to this Court the record and proceedings of the case in said court, wherein your petitioner was appellant and the Terminal

Railroad Association of St. Louis and sixteen other railroad defendants and a transfer company were appellees, numbered 9366, for review and determination by this Court.

STATEMENT OF THE MATTERS INVOLVED.

Your petitioner filed its bill in the District Court at St. Louis, Missouri, on August 24, 1931, against the respondents, as defendants, for temporary and permanent injunctive relief, under Sections 1 and 2 of the Sherman Antitrust Act, and Sec. 26, Title 15, U. S. C. A. (R. 2; Appendix 39). A preliminary injunction was granted, Judge Merrill E. Otis sitting specially, with bond in the sum of $15,000 (R. 16). After a trial on the merits, before Judge Charles B. Davis, the Court reversed Judge Otis, on the same state of facts, and dismissed the bill October 19, 1931, "with cost to the defendants," for want of legal capacity in plaintiff to sue for the relief prayed for, and because no violation of said Antitrust Act was shown (R. 38). Plaintiff appealed in due time (R. 39) and on October 25, 1932, this decree was affirmed by the Court of Appeals (R. 178) on the sole ground of petitioner's want of capacity to sue. The Court refused to consider the Antitrust issue (R. 177). The appellant, your petitioner, now seeks a review by this Court.

The bill charges that respondents, seventeen interstate railroad corporations, and their corespondent, the Colum-

bia Terminals Company, an interstate trucking corporation, had entered into and were about to carry out an unlawful contract, combination and conspiracy to destroy the interstate transfer or trucking business of your petitioner, carried on within and between the Cities of St. Louis, Missouri, and East St. Louis, Illinois (R. 7). Respondents deny the bill's allegations and plead a defense based on the priviso to Section 26 of Title 15, U. S. C. A., viz., want of legal capacity in petitioner to sue the respondent carriers, all being subject to the Interstate Commerce Act, Chapter 1, Title 49 (R. 16).

As petitioner's evidence was undisputed in the District Court, and the correctness of its statement of the facts in the Court of Appeals was unchallenged by respondents (R. 168), the cause was tried, in both courts, on what is tantamount to an agreed statement of the facts, which we summarize here.

All steam railroad lines, including respondent carriers, serving St. Louis, Missouri, and East St. Louis, Illinois, have, for more than twenty years, employed transfer or trucking companies to receive, deliver and transport for them, within and between said cities, their less-than-carload intra and interstate freight, originating at, destined to, and passing through said cities (R. 63, 69, 83). In a normal year the traffic amounts to about a million tons (R. 56).

At the time of the formation of the combination complained of four transfer companies, including petitioner

and respondent, Columbia Terminals Company, were and had been employed, for many years, by all of the rail respondents to handle this traffic (R. 62, 70); the movement of the greater bulk of it involved transportation across the state line (R. 70).

To perform the service the transfer companies maintained, at their own expense, their own freight depots, twelve in all, located in the business centers of said cities, and away from the rails of the carriers (R. 50). These off-track stations had to be and they were always designated in the official tariffs of the carriers as places where they will receive and deliver freight, and to and from which their line-haul rates apply (R. 49).

The contracts of employment between the carriers and the transfer companies were always in parol, always individual, never jointly made (R. 63, 75), each carrier, not the shipper, paying for the service rendered it (R. 59, 89), no carrier having any more interest in the service rendered the others than one shipper has in the service rendered other shippers by the same carrier. (See Plaintiff's Exs., 3, 4 and 5, R. 46 and 75.) Keen competition always existed among the transfer companies for the business of the shippers and receivers of the traffic, and the good will and business of the carriers (R. 43, 61).

For a number of years previous to the formation of the combination, in May, 1926 (R. 44, Ex. 2), the Columbia Company and a number of the executives and traffic officials of its corespondents, some of whom had a financial

interest in the success of the Columbia Company (R. 62, 65-66, 123), had diligently fostered a movement to give all of this business to the Columbia Company (R. 43-48, 59, 63, 64). The plan was to have all of the rail respondents enter into a mutual understanding that each would discontinue its individual employment of the petitioner and the other two competitors of the Columbia Company, and that each, independently of the others, would agree, in writing, with the latter to employ it alone, and no other transfer company, to handle its individual traffic (R. 44, 59, 61).

While the carriers were always free to hire and fire, at will, these transfer "agents" (R. 15), yet the Columbia Company, aided by the representatives of two or three lines, co-operating with it, had never been able to obtain, on a basis of efficiency, a complete monopoly of the business, after many years of effort. (See Plaintiff's Ex. 1, R. 44, and Maxwell's and Clark's testimony, R. 58 to 64.) So, the combination was formed for the specific purpose of securing unanimous action by the carriers in "firing" all of the competitors of the Columbia Company, and to enable the latter to obtain a complete monopoly of their individual transfer business. (See Maxwell's and Clark's evidence, R. 58-64, and the forms of contract originally agreed upon, R. 47).

To secure such unanimous action the Columbia Company, on July 17, 1925, made a written offer (R. 54) to its corespondents, except the Terminal Railroad Associa-

tion, to reduce its transfer rates 10 cents per ton, if all of them would designate in their several tariffs its off-track stations "as the only off-line stations they would use for receipt and delivery of freight" in St. Louis and East St. Louis, and individually, not jointly, "contract" with it for all truck service then performed for them by its competitors. That they might take advantage of this proffered reduction in the Columbia's rates, its offer was orally accepted by its corespondents, except two, at a meeting of their representatives on May 28, 1926, effective January 1, 1927. The two excepted respondents joined in the combination at a later date (R. 44, 59).

To put the plan into effect individual forms of contract for each carrier and the Columbia Company to sign were drafted and agreed upon by respondents (R. 46, 59), except the Terminal Association, who did not come into the picture until the spring of 1931 (R. 74). For some unexplained reason the respondents, in March, 1931 (R. 49, 74), abandoned their original plan to sign the individual agreements and on June 1, 1931, they had their corespondent, the Terminal Railroad Association, execute a single contract with the Columbia Company (Plaintiff's Ex. 10, R. 14, 49-50), covering the services provided for in the original individual agreements, the provisions of the single contract being substantially the same (R. 154). With some differences, unimportant here, the traffic was to be handled under Exhibit 10 in the same way as it had been handled for more than twenty years, and in the same

way it would have been under the individual contracts had they been executed instead. No new method or practice of handling the traffic is contemplated or provided for in said contract.

Petitioner contended Exhibit 10 to be a device to evade the Sherman Act, for the Terminal Company is merely a switching company, and does not and never has used this transfer service, assumes no obligation under its said contract, and is a dummy contractor.

In May, 1927, to make effective the individual contracts, prepared pursuant to the oral agreement of the combination in May, 1926, a tariff was filed, which omitted the off-track stations of petitioner (R. 49, 72). This tariff was protested, and suspended by the Commission, and that body, of its own motion, ordered a general investigation of the handling of the aforesaid traffic by the respondent carriers (R. 81), which continued over a period of four years, and was finally concluded July 27, 1931 (R. 163). After the Commission finally disposed of the case this bill was filed, heard and dismissed October 19, 1931. After its dismissal, the tariffs on file and the contract, Exhibit 10, went into effect November 1, 1931.

The direct and necessary effect of the combination and its oral agreement to fire the petitioner was to destroy 99 per cent of the business of your petitioner, valued at $250,000 (R. 63, 66, 70, 171), and from which it had a gross income of $300,000. Petitioner employed 100 persons, had a monthly pay roll of $12,500, and used fourteen tractors

and sixty-eight trailers, and maintained three off-track freight stations (R. 70). The respondents all understood that the immediate and obvious effect of the combination and its contracts upon the railroad business of petitioner would be to destroy it (R. 59, 61, 63), and the Court of Appeals so held (R. 171). The ultimate object of the carriers, in forming the combination, was to avail themselves of the reduced rates, and, so they say, to improve their service. The Columbia Company was after a monopoly of the business. The real motive of all of the respondents was profit.

At the trial the respondents offered in evidence reports of the Interstate Commerce Commission in the proceedings referred to above (R. 80, 143), and a letter of petitioner (R. 76) to the president of the Terminal Association, dated April 21, 1931, in which the petitioner, *after* the Commission had disposed of the case (R. 80), made a bid for the contract let to the Columbia Company, in response to what petitioner deemed a *pretended* call for bids, at that time, by the Terminal Association.

The only permanent relief petitioner sought, in the District Court, was a perpetual injunction to restrain the respondents from "firing" the petitioner and from carrying out the monopoly provisions of paragraphs 25 and 26 of their contract (Ex. 10, R. 52), obligating the carriers to designate the off-track stations of the Columbia Company as "*the only* 'off-track' stations of the railroads" and to deliver to the Columbia "*all*" of their less-than-carload

freight. If the words "only" and "all" had been deleted that contract would not have become involved in this case.

The Court of Appeals affirmed the decree of the District Court on the sole ground that petitioner had no right to sue under Section 16 of the Clayton Act, and declined to discuss the merits of the case (R. 177). It made no order directing the transfer of the case to the law side of the District Court.

REASONS FOR ISSUANCE OF THE WRIT.

I.

It is certain that the question of petitioner's right to sue these carriers, under Section 16 of the Clayton Act, on the facts of this record, has never been discussed or decided in any opinion of any of the Circuit Courts of Appeals or of this, the Supreme Court. The Court of Appeals was of that opinion (R. 175). It is, therefore, a new and important question for this Court to expressly decide.

II.

The ruling of the Court of Appeals that petitioner had no right to bring its bill is in conflict with the action of this Court and the Court of Appeals of the Second Circuit in taking full jurisdiction and deciding the case of Moore v. N. Y. Cotton Exchange et al., 296 Fed. 61, and 270 U. S. 593, that case having been cited and relied upon in the Court of Appeals by petitioner.

III.

As the subject matter of petitioner's bill is not within the jurisdiction of the Interstate Commerce Commission, the Court of Appeals erred in affirming the decree of the lower court on the ground that the proviso to Section 26, Title 15, U. S. C. A., denies petitioner the right to sue these carriers for injunctive relief.

IV.

If the subject matter of petitioner's bill is within the jurisdiction of the Commission, then the presence of the Columbia Company as an indispensable party ousted that jurisdiction. But the Court of Appeals erroneously failed and refused to pass upon that question, though expressly requested so to do (R. 179).

V.

The District Court erred in holding there was no violation of the Antitrust Act shown, and the Court of Appeals erred in not reversing this ruling.

VI.

If petitioner has no right to sue on the equity side of the Court, then the case should have been and should now be transferred to its law side.

VII.

The Court of Appeals erred in its statement of the facts upon which it based its conclusion that the subject matter of petitioner's bill was within the jurisdiction of the Interstate Commerce Commission.

VIII.

The Court of Appeals erred in holding: (a) That petitioner asked no relief against the Columbia Company (R. 171); (b) that rates and service of the carriers were involved (R. 172-173); (c) in holding that the subject matter of the controversy involved the adoption by the carriers of a method or practice of handling the less-than-carload traffic (R. 174); (d) in holding that the Interstate Commerce Commission's lack of jurisdiction "to name for the railroads the particular agency which shall perform the service is of no consequence" (R. 174); (e) in stating the scope and purpose of the general investigation conducted by the Interstate Commerce Commission (R. 170), and (f) in stating the conclusion reached by the Commission (R. 170).

IX.

The petitioner gave a preliminary injunction bond in the sum of $15,000 and the erroneous dismissal of its bill may subject it to an action for damages thereon (R. 18).

X.

The opinion of the Court of Appeals contains erroneous intimations that no violation of the Antitrust Act is shown (R. 174-175).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Honorable Court, directed to the Circuit Court of Appeals of the United States for the Eighth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled in its docket, 9366, Central Transfer Company, Appellant, v. Terminal Railroad Association of St. Louis et al., Appellees, and that the said judgment or decree of the said Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

CENTRAL TRANSFER COMPANY,
By GLENDY B. ARNOLD,
Counsel for Petitioner,
418 Olive Street, St. Louis, Mo.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.....

CENTRAL TRANSFER COMPANY,
PETITIONER,

v.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS *et al.*,
RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The District Court filed no opinion in the case. The opinion of the Court of Appeals is not yet officially reported, but is printed in full in the record, beginning at page 168. It was rendered October 18, 1932.

II.

JURISDICTION.

(1) Section 347, Title 28, U. S. C. A., gives this Court jurisdiction to review any judgment or decree of the United States Circuit Court of Appeals for the Eighth Circuit.

(2) The date when the judgment of affirmance became final was October 18, 1932 (R. 178).

(3) Petitioner sought, in the District Court of the United States for the Eastern Judicial District of Missouri, preliminary and perpetual injunctive relief, under Section 26, Title 15, U. S. C. A. (Appendix 39), against a threatened irreparable loss and damage by a violation of Sections 1 and 2 of the Sherman Antitrust Act, being Sections 1 and 2 of Chapter 1 of Title 15, U. S. C. A. (R. 2-10) (Appendix 39). The bill was dismissed "with costs to the defendants" (R. 38), and on appeal it was affirmed by said Court of Appeals, as aforesaid.

(4) The jurisdiction of this Court to review the judgment of the Court of Appeals is sustained by Duplex Printing Press Co. v. Deering, 254 U. S. 443; Moore v. N. Y. Cotton Exchange et al., 270 U. S. 593, and Bedford Cut Stone Co. v. Journeymen's Stone Cutters Ass'n, 274 U. S. 37.

III.

STATEMENT OF THE CASE.

As a concise statement of the case is made in the petition for the writ, under the caption "Statement of the Matters Involved," it will not be repeated here.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in affirming the decree of the District Court for the reasons assigned in the petition for the issuance of the writ of certiorari.

ARGUMENT.

Summary of the Argument.

I.

Neither a federal court nor the Interstate Commerce Commission may enter a decree or make an order which would destroy the contract rights of the Columbia Company or these carriers unless they are parties to the proceedings.

Twining v. New Jersey, 211 U. S. 78;
Barney v. Baltimore, 6 Wall. 280;
Shields v. Barrow, 17 How. 130;
U. S. v. Northern Pac. R. Co., 134 Fed. 715.

As the Commission held that it had no jurisdiction of the Columbia (R. 105, 106), it has no jurisdiction of this case.

II.

Unless the Commission has power to make some administrative order in this case, it is not controlled by the proviso to Section 16 of the Clayton Act.

Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 70;
U. S. Navigation Co. v. Cunard S. S. Co., 7 U. S. Sup. Ct. Adv. Op. 300, 50 Fed. (2d) 83, 86.

III.

The Commission has no jurisdiction because no findings requiring technical knowledge are called for, only the construction of an oral agreement being involved.

Ibid.

IV.

If the combination and oral agreement to fire the petitioner were illegal, then filing of the tariff by the carriers, eliminating petitioner's off-track stations, was an illegal act. So, agreeing to enter into Exhibit 10, in so far as it tended to destroy petitioner's business, was an illegal act.

Tri-State Amusement Co. v. F. P. Highlands Amusement Co., 192 Mo. 404, 425;
Boston and Maine R. Co. v. Piper, 246 U. S. 439, 445;
Sage v. Hampe, 235 U. S. 99.

V.

An illegal tariff or contract cannot be made the basis for the exercise of jurisdiction by the Commission.

Sage v. Hampe, 235 U. S. 99.

VI.

Even if the Commission had jurisdiction, it has exhausted it, and its negative approval of the illegal oral

agreement to fire the petitioner is no bar to petitioner's right to injunctive relief.

Section 21, Title 15, U. S. C. A.;
Section 22, Title 49, U. S. C. A.;
U. S. Navigation Co. v. Cunard S. S. Co., 50 Fed. (2d) 83, 86.

VII.

The petitioner being engaged in the interstate transportation of freight is engaged in interstate commerce.

U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 312;
Addyston P. & S. Co. v. U. S., 175 U. S. 211, 241.

VIII.

There is no commerce so insignificant as not to be within the protection of the Sherman Antitrust Act.

U. S. v. Patterson, 222 Fed., l. c. 619;
O'Halloran v. Slate Co., 207 Fed., l. c. 191.

IX.

At common law petitioner has a legal right to the continuous enjoyment of its contractual relations with each of its employers and to protection against any combination or conspiracy to destroy it.

Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 249.

X.

The Sherman Antitrust Act is the embodiment of the common law against illegal combinations, contracts and conspiracies for the protection of interstate trade and commerce.

Standard Oil Co. v. U. S., 221 U. S. 1, 59.

XI.

This combination and its oral agreement are violative of the Sherman Antitrust Act, under a ruling of this Court in a similar case.

U. S. v. Terminal R. Ass'n, 224 U. S. 383, 400, 411.

XII.

If the interstate trade and commerce of a hat and printing press manufacturer and a coal mine and quarry operator are within the protection of the Sherman Antitrust Act, then so is the business of petitioner.

Loewe v. Lawlor, 208 U. S. 274, 293;
Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465;
Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295;
Bedford Cut Stone Co. v. Stone Cutters' Ass'n, 274 U. S. 37.

XIII.

Where the direct, necessary or intended result of the acts and contract of the combination is to destroy the interstate commerce of a complainant, the acts, contract and combination are all illegal under the Sherman Anti-trust Act.

U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290, 342;
Standard Oil Co. v. U. S., 221 U. S. 1, 65;
Duplex Printing Press Co. v. Deering, 254 U. S. 443;
Addyston P. & S. Co. v. U. S., 175 U. S. 177, 244;
U. S. v. Standard Oil Co., 173 Fed. 177, 188.

XIV.

Where the evidence shows beyond question that the direct, necessary and intended result of the acts of a combination is to destroy the interstate commerce of a complainant, the rule of reason has no application.

U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290, 340;
Standard Oil Co. v. U. S., 221 U. S. 1, 64;
U. S. v. American Tobacco Co., 221 U. S. 106, 179.

XV.

That the carriers were seeking to save money and to improve their service is no defense to this case.

U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290, 341.

XVI.

If petitioner has the right to sue, then injunction was the remedy.

Bedford Cut Stone Co. v. Stone Cutters' Assn., 274 U. S. 37.

Argument.

I.

Petitioner's Right to Sue.

The case of Moore v. N. Y. Cotton Exchange et al., supra, is authority for petitioner's right to sue these carrier respondents. The case was an injunction suit under Section 16 of the Clayton Act (Sec. 26, Title 15, U. S. C. A.) and the Sherman Anti-Trust Act. The Western Union and another telegraph company were codefendants and indispensable parties. The Western Union was and is a "common carrier, subject to the provisions of Chapter 1 of Title 49, Transportation," and within the terms of the proviso to said section of the Clayton Act, but the Cotton Exchange was not subject to the provisions of the Interstate Commerce Act, and, therefore, not subject to the jurisdiction of the Interstate Commerce Commission.

The District Court (291 Fed. 681), the Circuit Court of Appeals (296 Fed. 61) and this Court (270 U. S. 593) assumed full jurisdiction of that case and decided all ques-

tions presented therein, on the assumption that the plaintiff had a right to bring the suit under said section of the Clayton Act, notwithstanding the proviso thereto, and that the suit was against a common carrier subject to the Interstate Commerce Act. Whether jurisdiction was assumed because of the joinder of an indispensable party—the Cotton Exchange—not subject to the Interstate Commerce Act, or because the subject matter of the bill was, per se, not "in respect of any matter" over which the Commission had jurisdiction, does not appear from the opinion in the case. It must have been on one or the other, and may well have been on both grounds. Let us see.

Due process of law requires that all parties having rights in the controversy be made parties to any suit or proceeding, before any tribunal, which may impair or destroy such rights (Twining v. New Jersey, 211 U. S. 78; Barney v. Baltimore, 6 Wall. 280; Shields v. Barrow, 17 How. 130; U. S. v. Northern Pac. R. Co., 134 Fed. 715). Those cases hold that if a federal court is without power to decide as between the litigant parties because of the absence of an indispensable party, it should make no decree. Due process makes that rule applicable to the Commission.

Of course, the Commission had no jurisdiction of the New York Cotton Exchange and was powerless to summon it to answer any complaint of the plaintiff. The contract between that exchange and the telegraph companies could not be destroyed by any tribunal, on any ground, in the absence of the exchange as a party to the proceedings.

Although the Commission had jurisdiction of the telegraph companies, it could grant no relief against the Cotton Exchange, and for that reason the plaintiff could not bring the subject matter of the bill within the jurisdiction of the Commission, notwithstanding the fact that it was a suit, under Section 16 of the Clayton Act, to enjoin a threatened violation of the antitrust acts by a common carrier subject to the Interstate Commerce Act. Jurisdiction was, therefore, in the federal court, as a matter of course, and that is equally true of petitioner's case.

The Commission correctly held "that motor truck or wagon transfer companies performing terminal services for and on behalf of carriers are not common carriers subject to the (Interstate Commerce) act" (R. 105). The Court of Appeals made a similar ruling (R. 171). If this Court so holds, then the Commission is without power to summon the Columbia to answer any complaint of petitioner. Petitioner does not believe it could sue these carriers in a federal court or before the Commission on the facts alleged without joining the Columbia, nor could it sue the latter without joining the carriers. The relief sought, if granted, would have deprived the Columbia of its right, under paragraphs 25 and 26 of Exhibit 10 (R. 52), to take over the business of petitioner.

Notwithstanding the fact that plaintiff, in the Moore case, supra, was seeking, under Section 16 of the Clayton Act, to enjoin threatened violations of the antitrust acts by common carriers subject to the Interstate Commerce

Act, the subject matter of his bill did not involve violations of or call for the application of any of the provisions of the Interstate Commerce Act, although the contract which was the basis of the suit did involve the transmission of telegraphic messages, a subject matter within the jurisdiction of the Commission. In that respect petitioner's case is an exact parallel, as will presently be shown.

The Commission, upon the most persistent insistence of the respondents, expressly held that it was powerless to prevent these carriers from discontinuing, at will, the service of petitioner (R. 106). It further held that the carriers were free to select the agencies to perform this transfer service, and affirmed a previous ruling that it had no power over these trucking companies (R. 105). Those rulings are not reversed by the Court of Appeals. And, strange as it may seem, we lost this case on this point, in both courts below, with the carriers still insisting, in their answer (R. 15), that the Commission is without power to prevent them from firing petitioner, either singly or in combination.

The purpose of the proviso to Section 16 of the Clayton Act is to conserve the jurisdiction of the Commission and not merely to confer upon the carriers immunity from injunction suits by private parties for threatened violations of the antitrust acts. That conclusion is conclusively established by the terms of the proviso itself, and Section 11 of the Clayton Act (Sec. 21 of Title 15, U. S. C. A.), which

provides that "No order of the Commission * * * or the judgment of the Court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws." Said sections 11 and 16 are parts of the same act, adopted at the same time, and by section 1 (Sec. 12, Title 15, U. S. C. A.) the term "antitrust laws" is made to include Sections 1 and 2 of the Sherman Antitrust Act (Appendix 39).

Section 11 of the Clayton Act gives the Interstate Commerce Commission "Authority to enforce compliance with sections 13, 14, 18 and 19" of that act by common carriers. (Fruit Growers Express Inc. v. Federal Trade Com., 274 Fed. 205). Section 5 of the Interstate Commerce Act (Title 49, U. S. C. A.) gives the Commission power to relieve the carriers of certain other provisions of the antitrust acts, and perhaps to enforce some of them by affirmative orders. We think it is this jurisdiction of the Commission which the proviso to section 16 is intended to conserve.

As the Commission would be powerless, in this case, to relieve the carriers of the binding force of the antitrust acts, or to enforce them by any administrative orders, they are not sued here "in respect of any matter subject to the * * * jurisdiction" of the Commission, no administrative function being involved (Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 285; L. & N. R. Co. v. Cook Brewing Co., 223 U. S. 70). *Only the construction of an oral contract, the terms of which are admitted, is involved*

here, and under the authority of those cases petitioner had the right to sue.

We also think the necessary converse of the reasoning of this Court in U. S. Navigation Co. v. Cunard S. S. Co., supra, fully sustains this petitioner's right to sue. It is not likely that this Court would have sustained the dismissal of the bill in that case unless the Court had concluded that the Shipping Board had power to grant relief to the plaintiff.

The subject matter of the bill involves petitioner's right to enjoy the good will and patronage of its employers, in the conduct of its interstate transportation business, and protection of that right, under the Clayton and Sherman Antitrust Acts, against a combination and agreement formed and entered into by respondents, with the intention to destroy petitioner's said business (R. 61, 64).

The bill charges, and respondents admit, that the carriers combined and orally agreed, on May 28, 1926, that each carrier would discontinue its individual employment of petitioner, *knowing that such action would destroy petitioner's business* (R. 61, 64). Briefly stated, that is the whole subject matter of this bill. As the facts are undisputed, only an issue of law is presented for decision. Petitioner contends that the combination and its agreement are illegal, and respondents that they are not. No relief was sought in respect of any matter over which the Commission had any jurisdiction, and no lawful act or contract of respondents would have been enjoined.

The *subject matter* of the contract between the Columbia and the carriers, Exhibit 10 (R. 49), has nothing to do with the case, although the monopoly provisions in sections 25 and 26 thereof could not have been complied with if the relief petitioner sought had been granted. These simple terms, however, do not constitute the subject matter of that contract. They impliedly obligate the carriers to give petitioner's business to the Columbia and not to employ petitioner during the life of the contract. The performance of the oral agreement (R. 44, 49) and not Exhibit 10, signed five years afterwards (R. 50), is what destroyed petitioner's business. Performance of the oral agreement, without the execution or performance of Exhibit 10, would have destroyed petitioner's business. Like the subject matter of the plaintiff's bill in the Moore case, supra, the subject matter of petitioner's bill is not within the jurisdiction of the Commission, but further of this point.

The relief sought by petitioner would have merely preserved the status quo against the joint and illegal action of respondents in so far as it tended to destroy petitioner's business. Contrary to the opinion of the Court of Appeals (R. 172), it would have left both petitioner and the Columbia in the employ of the carriers. There would have been no interference at all with any of the provisions of their proposed contract, Exhibit 10, except those indirectly obligating the carriers not to use the service of petitioner, and they are contained, exclusively, in the

words "only" and "all" in paragraphs 25 and 26, respectively, of said exhibit (R. 52).

If this combination and the formal execution and final performance of its oral agreement to fire the petitioner violated Sections 1 and 2 of the Sherman Antitrust Act, then the filing of the tariff, eliminating petitioner's off-track stations and seeking the Commission's approval of the monopoly provisions of Exhibit 10 by the carriers were illegal acts (Boston and Maine R. Co. v. Piper, 246 U. S. 439; Tri-State Amusement Co. v. F. P. Highlands Amusement Co., 192 Mo. 405, 425), *unless the Interstate Commerce Commission was given power to legalize them, as held in Keogh v. Chicago and Northwestern Ry. Co., 260 U. S. 156.* The Commission has no such power—these respondents have never so contended, and the Court of Appeals did not so hold. An illegal contract or tariff cannot be made the basis of the exercise of valid jurisdiction by the Commission (Sage v. Hampe, 235 U. S. 99; Boston and Maine R. Co. v. Piper, supra).

If the Commission had jurisdiction of the subject matter of this controversy, it has exhausted that jurisdiction by its negative ruling that the combination and its proposed written agreement (Exhibit 10) are not violative of the Antitrust Act (R. 99). This Court is not bound by that ruling, for a number of obvious reasons (Section 21, Title 15, U. S. C. A.). It is not an order of the Commission (Brady v. I. C. C., 43 Fed. [2d] 847). It was not based on the facts of this case. The relief sought would not have impinged upon any order of the Commission.

II.

Illegal Combination.

That the Antitrust Act was violated is not fairly open to debate. While the Court of Appeals declined to pass on that question, yet it did make some adverse comments thereon. It overlooked a controlling factor in the case when it said:

> "It is not the agency selected by the carriers that is the real matter in controversy, but, rather, the adoption by the carriers jointly of a method or practice of handling less-than-carload freight * * *, which eliminates plaintiff as a competitor of the agency selected" (R. 174).

That brief statement, erroneous, as we believe it is, presents the crux of the whole argument. It is the joint action of the carriers which destroyed the business of petitioner and brought this case into court, for petitioner contends that such joint action was in direct violation of the Sherman Antitrust Act. If it were not, petitioner has no case.

At common law, petitioner had a legal right to the continued enjoyment of its contractual relations with the carriers and, if jurisdiction otherwise attached, to injunctive relief, in a federal court, against a threatened destruction of that right by a common-law conspiracy. In Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 249, it is said:

> "Plaintiff having, in the exercise of its undoubted rights, established a working agreement between it and its employes, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was 'at will,' terminable by either party at any time, is of no consequence."

In the course of the opinion this Court also said:

> "In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, *or having that as its necessary effect*, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employes constitutes such a violation." (Italics ours.)

Illegal contracts, combinations and conspiracies in restraint of commerce and trade at common law are violative of the Sherman Antitrust Act when they involve commerce and trade among the several states (Standard Oil Co. v. U. S., 221 U. S. 1, 49). As the Hitchman Coal case did not involve interstate commerce, but was a suit to enjoin a conspiracy, at common law all that would be necessary to make it a controlling precedent for this case is the substitution of the word "employers" for the word "employes" in the above language of the opinion, for, under that decision, we have a common-law conspiracy here, which destroyed the transfer business of petitioner (R. 171), and, as it was interstate commerce, that fact makes the conspiracy a violation of the Antitrust Act.

If the interstate trade and business of a hat and printing press manufacturer and a coal and quarry operator are within the protection of the Sherman Antitrust Act, then so is the interstate transportation business of the petitioner (Loewe v. Lawlor, 208 U. S. 274, 293; Duplex Printing Press Co. v. Deering, 254 U. S. 440, 465; Coronado Coal Co. v. U. M. Workers of America, 268 U. S. 295; Bedford Cut Stone Co. v. Stonecutters' Assn., 274 U. S. 37). Surely these respondents are not privileged to do that which is unlawful when done by every other combination of private persons in the United States.

We think the combination complained of here and its contract has been condemned, in principle, by this Court in U. S. v. Terminal R. R. Assn., 224 U. S. 383. The Terminal Association was jointly owned by fifteen railroads, thirteen of which are respondents in this case. Each member of the association entered into the following stipulation with the association:

> "III. In consideration of the foregoing each of the proprietary companies, for itself only and not for others, accepts the right of joint use hereinbefore granted by the first party and hereby covenants and agrees that it will forever make use of the bridge and terminal properties of the first party, as above described, for all passenger and freight traffic within its territory through, to and from St. Louis and destined to cross the Mississippi River at St. Louis, and pay therefor as herein provided."

That stipulation, taken from the record in that case, was challenged by the Government as violative of the Sherman Antitrust Act, and this Court so held and ordered it stricken from the contracts of the association (loc. cit. 411). The only reason given by this Court for the elimination of the foregoing stipulation is contained in the following language, at page 400, viz.:

> "By still another clause in the agreement, the proprietary companies obligate themselves to forever use the facilities of the Terminal Company for all business destined to cross the river. This would seem to guarantee against any competitive system, since the companies to the agreement now control about one-third of the railroad mileage of the United States."

The Interstate Commerce Commission and the Court of Appeals conceded that the Terminal Association was engaged in the same business as these transfer companies, viz., terminal transportation of interstate freight, one by motor trucks and the other by rail (R. 99, 175). If the fifteen proprietary owners of the Terminal Association are forbidden by the Sherman Antitrust Act to combine and enter into a contract with the association for the purpose of preventing the establishment of a "competitive system" in the future, then why does not that rule forbid the owners of the Terminal Association from combining and agreeing among themselves and with the Columbia to destroy the competition and especially the business of this petitioner?

These carriers are certainly in no better position to form this combination than they would be if they owned all of the capital stock of the Columbia Company. If that were true, we do not believe the Antitrust Act would permit them to destroy the business of a competitor of the Columbia by combining and agreeing as they have done in this case. If they could, then a group of shippers could likewise combine and agree to give all of their individual freight to one carrier, to the destruction of its competitors. So, too, the nine Eastern carriers in this case could combine and agree to give all of their westbound business to one of the Western lines, to the destruction of its competitors.

Since the Terminal Association case was decided a most formidable competitor of the Association has come into existence in the Alton and Southern terminal company, and this could not have happened but for that decision. If the stipulation there condemned should be revived by a reversal of that case here, it would wreck the Alton & Southern as quickly as the contract here wrecked petitioner's business, as the Alton & Southern gets substantially all of its switching business from the owners of its competitor, the Terminal Association.

III.

Other Rulings of the Court of Appeals.

The Court characterizes the execution of Exhibit 10 as "the adoption by the carriers jointly of a method or prac-

tice of handling" this freight (R. 174). By the execution of that instrument the parties merely reduced to writing a contract, substantially all of the provisions of which had existed in parol for over twenty-five years (R. 63, 85), and which made no change in the method of receiving, delivering or moving the freight. What the carriers adopted "jointly" was not a practice, but an illegal oral agreement to fire the petitioner, and that has become "the real matter in controversy" here.

The Court said it was of no consequence that the Commission had no control over the carriers' discretion to select a transfer company to perform this service (R. 174). If the carriers were free in this respect, then is not the Commission without jurisdiction when they are charged with illegally exercising that discretion?

The Court erred in saying that, "apparently," "all that the carriers have done is to arrange jointly for the performance of a terminal service * * * not differing substantially from that performed by the Terminal Association with respect to carload freight" (R. 175).

That statement seems to be a comment on the merits of the case which the Court declined to consider (R. 177). Its import is not clear. Undoubtedly, as shown above, this Court declared illegal the stipulation between the carriers and the Terminal Association, providing for the latter's switching of their individual carload freight. If that is what the Court of Appeals means, we agree.

On the other hand, if the Court means that these carriers

have combined here to establish a joint facility as they did by consolidating the bridge and terminal properties into the Terminal Association, then the Court's comparison is not apposite.

This Court, in the Terminal Association Case, supra, made a clear distinction between the validity of the consolidation and the monopoly stipulation in the contracts of the consolidated company and its joint railroad owners. It sustained the consolidation upon the condition, among others, that the monopoly stipulation be stricken out, because it violated the Sherman Antitrust Act, *and that is the ruling we invoke in this case.*

The comparison is not apposite for another reason. The Terminal Association was jointly owned by the carriers, while there is nothing joint about the arrangement here, except the oral agreement to fire the petitioner and to sign Exhibit 10. That exhibit is a condensation of "Plaintiff's Exhibits 3, 4 and 5" (R. 116, 131, 154), which are the individual contracts the respondents intended to sign up until March, 1931 (R. 49, 59).

Exhibit 10 is not a joint contract. It is in almost the identical language of Exhibits 3, 4 and 5, one of which is in full at R. 131. It is simply *a device* whereby one transfer company is employed by sixteen carriers, under sixteen individual contracts, made by a common agent. The service of the Columbia is personal and confidential, each carrier paying its own bills, with no obligation to or

for its associates, and having no interest in the service performed for them (R. 75).

The Columbia is no more a joint facility of the carriers than it is such for the great number of others for whom it hauls freight. It is no more a joint facility now than it has been for over twenty-five years, as these carriers have employed it during that time. *The only substantial change made in that employment by Exhibit 10 was to take away petitioner's intrastate business and give it to the Columbia.*

It seems clear the Court erred in stating (R. 170) that the investigation of the Commission was "to determine the lawfulness of the methods proposed by the carriers for reducing the number of off-track stations." (See R. 89 and 94.) That issue was injected into the case afterwards (R. 99, 104).

The Court erred in saying, as did the author of the syllabus to the Commission's report (R. 81), that "the Commission reached the conclusion * * * that the proposals to reduce the number of off-track stations * * * would not be harmful to the public interest" (R. 170). The report itself shows it merely concluded that "experience alone will answer that question" (R. 98, 100).

That the Court erred in holding that petitioner "asks no relief against the Columbia" is shown at pages 10, 24 and 179 of the Record.

IV.

Disposition of the Case.

If the Court holds that petitioner has the right to bring this suit, we presume the Court will then pass on the merits of the case. If it be held that petitioner has no right to sue in equity, then petitioner requests that the decrees below be reversed, and the pleadings ordered amended and the case transferred to the law side of the District Court, under Rule 22 of the Equity Rules and Section 397, Title 28, U. S. C. A. (Appendix 40). White v. Sparkhill Realty Corporation, 280 U. S. 500, and Diamond Alkali Co. v. P. C. Thomson & Co., 35 Fed. (2d) 117, 120, where that was done by the appellate court *of its own motion*. The Court of Appeals erred in not determining that the evidence shows a case for the law side of the Court.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the decrees of the District Court and the Court of Appeals be reversed and justice done to petitioner, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Court of Appeals and finally reverse it.

GLENDY B. ARNOLD,
418 Olive Street, St. Louis, Mo.,
Counsel for Petitioner.

APPENDIX.

SHERMAN ANTITRUST ACT.

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209.)" (U. S. C. A., Title 15.)

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209.)" (ib.)

CLAYTON ANTITRUST ACT.

"Sec. 12. 'Antitrust laws,' as used in sections 12 to 27, inclusive, of this chapter, includes sections 1 to 27, inclusive, of this chapter. * * * (Oct. 15, 1914, c. 323, Sec. 1, 38 Stat. 730.)" (U. S. C. A., Title 15.)

"Sec. 26. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief,

in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this chapter, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapter 1 of Title 49, Transportation, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. (Oct. 15, 1914, c. 323, Sec. 16, 38 Stat. 737.)"

JUDICIAL CODE.

"Sec. 397. In case any United States court shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings

had been originally in the amended form. (Mar. 3, 1915, c. 90, 38 Stat. 956.)" (U. S. C. A., Title 28.)

TITLE 49, TRANSPORTATION.

"Section 22. Restriction. * * * and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; * * *."

EQUITY RULES.

"Rule 22. If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential. (See 28 U. S. C. A., Sec. 397.)"